

MARGARET L. CARTER (S.B. #220637)  
mcarter@omm.com  
DANIEL R. SUVOR (S.B. #265674)  
dsuvor@omm.com  
O'MELVENY & MYERS LLP  
400 South Hope Street  
18<sup>th</sup> Floor  
Los Angeles, California 90071-2899  
Telephone: +1 213 430 6000  
Facsimile: +1 213 430 6407

Attorneys for *Amicus Curiae*  
County of Los Angeles

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CENTRO LEGAL DE LA RAZA;  
IMMIGRANT LEGAL RESOURCE CENTER;  
TAHIRIH JUSTICE CENTER; REFUGEE  
AND IMMIGRANT CENTER FOR  
EDUCATION AND LEGAL SERVICES,

**Plaintiffs,**

V.

EXECUTIVE OFFICE FOR IMMIGRATION  
REVIEW; JAMES MCHENRY, Director,  
Executive Office for Immigration Review;  
UNITED STATES DEPARTMENT OF  
JUSTICE; MONTY WILKINSON, Acting  
United States Attorney General,

## Defendants.

Case No. 3:21-cv-00463-CRB

**BRIEF OF *AMICI CURIAE* 28 CITIES  
AND COUNTIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

Hearing Date: March 4, 2021  
Time: 10:00 a.m.  
Courtroom: 6, 17th Floor  
Judge: Hon. Charles R. Breyer

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## INTEREST OF *AMICI CURIAE*

*Amici* are home to hundreds of thousands of immigrants and immigrant families, who are integral to the social fabric and future of *Amici's* communities. Immigrants contribute more than \$3 trillion GDP nationwide, and during the COVID-19 pandemic, immigrant workers have helped sustain essential sectors.<sup>1</sup> Immigrants also create jobs and build opportunities for others, including 2.8 million jobs in Los Angeles County alone.<sup>2</sup> And immigrants support families throughout the United States, with over 13 million U.S. citizen children depending on an immigrant parent.<sup>3</sup>

8       *Amici* recognize that it is critical to the well-being of the entire community to protect  
9 immigrants and their families from unjust removals of immigrant residents and to help immigrants to  
10 assert valid claims for immigration benefits or for relief from removal. For this reason, *Amici* have  
11 invested in a variety of initiatives to keep immigrants rooted in their communities, from citizenship  
12 classes at public libraries to direct legal services to help immigrants who otherwise could not afford  
13 representation in the visa application process or in removal proceedings.

14        But the challenged rule, *Appellate Procedures and Decisional Finality in Immigration Proceedings;*  
15      *Administrative Closure*, 85 Fed. Reg. 81588 (Dec. 16, 2020) (the Rule), harms these interests. The Rule  
16      strips important due process protections from immigrants who appear in immigration court and  
17      before the Board of Immigration Appeals (BIA), which in turn will mean that more immigrants'  
18      cases will be wrongly decided and more immigrants will be unable to assert, or to have immigration  
19      courts consider, valid bases for relief from removal or valid claims to immigration benefits. The Rule  
20      will thus cut off immigrants' ability to receive relief for which they otherwise would be eligible.

21 Fair process in immigration proceedings can have life or death consequences for *Amici*'s  
22 immigrant residents and significant social and economic consequences for *Amici*. Access to a fair  
23 process and procedures through which the court can consider or reconsider immigrants' claims can

<sup>1</sup> Raul Hinojosa-Ojeda et al., *Essential but Disposable: Undocumented Workers and their Mixed-Status Families, Modeling COVID-19 Economic Impacts and Government Relief Policies by Race and Immigration Status in Los Angeles County, California, and the United States*, UCLA N. Am. Integration & Development Ctr. & Mexican Instituto Nacional de Estadistica y Geografia 10, 20 (Aug. 10, 2020), <https://irle.ucla.edu/wp-content/uploads/2020/08/Essential-Undocumented-Workers-Final-w-Cover.pdf>.

<sup>2</sup> *Id.* at 23.

<sup>3</sup> *Id.* at 18.

mean the difference for many immigrant residents between being separated from their families and returned to a country where they may be killed, or living in safety and contributing to *Amici*'s communities. Fair process and procedures also help protect *Amici*'s investments in legal services and ensure effective representation for immigrant residents, thereby promoting the future prosperity of *Amici*'s communities. The Rule severely undercuts *Amici*'s investments in immigrant legal services and endangers *Amici*'s families and communities by eroding procedural protections for immigrants in removal proceedings. The Rule is also contrary to *Amici*'s interests in preventing arbitrary and capricious decisionmaking and protecting all residents from unlawful violations of their due process rights under the Fifth Amendment. For these reasons, the Rule should be enjoined.

## ARGUMENT

*Amici* adopt and concur in Plaintiffs' legal arguments and write separately to urge the Court to enjoin the Rule because of its harmful ramifications on local governments and communities like *Amici*'s, and because the Rule is arbitrary and capricious and violates immigrants' due process rights.

The Rule's several procedural changes will preclude immigrants from raising valid claims for relief and will demand greater resources from advocates providing removal defense. As a result, many immigrants will be removed despite the potential for immigration relief. This will gravely harm local communities: children in *Amici*'s communities who depend on immigrant parents will suffer the life-long trauma of family separation; *Amici* will lose vital contributors to their economies and cultural life; and *Amici*'s significant investments in removal defense will be frustrated because as each case demands further resources, *Amici* will be able to serve fewer immigrants in need of representation.

The Rule also violates the Administrative Procedures Act (APA), 5 U.S.C.A. § 551 *et seq.*, and immigrants' due process rights. The Executive Office for Immigration Review (EOIR) failed to acknowledge the practical ramifications of the Rule on local economies and communities—even after *Amici* raised these concerns to EOIR in public comments. This failure renders the Rule arbitrary and capricious. The Rule's heightened procedural burdens also violate immigrants' due process rights by unjustifiably depriving them of their right to raise valid claims for immigration relief. For these reasons, along with those raised by Plaintiffs, this Court should enjoin the Rule.

1       **I. THE RULE WILL HARM *AMICI'S* COMMUNITIES AND FRUSTRATE THEIR  
2 INVESTMENTS IN PROTECTING IMMIGRANT RESIDENTS**

3       **A. By Imposing Severe Procedural Burdens, The Rule Will Lead To The Unjust  
4 Removal Of Immigrants With Valid Claims For Relief From *Amici's*  
5 Communities**

6       The Rule imposes procedural burdens on immigration court and BIA proceedings that will  
7 inevitably result in the unjust and unfair removal of immigrants who otherwise would be eligible for  
8 relief. *First*, the Rule generally precludes administrative closure, a tool often used to put removal  
9 proceedings on hold so that immigrants can pursue alternative relief from U.S. Citizenship and  
10 Immigration Services (USCIS). 85 Fed. Reg. at 81590-91. *Second*, the Rule limits the ability of the  
11 BIA and immigration judges (IJs) to remand or reopen a case, even where a potential avenue for  
12 relief subsequently becomes available. *Id.* at 81589-90. *Third*, the Rule shortens the timeline for  
13 appeals, which will hinder advocates' ability to present a full defense and prompt hasty dismissals. *Id.*  
14 at 81588, 91-92. Each of these procedural restrictions will hurt residents in *Amici's* communities who  
15 have valid claims for relief that will be more difficult for them to assert and for courts to consider.

16       **1. The Rule Precludes the BIA and IJs from Administratively Closing  
17 Cases, Effectively Foreclosing Immigrants from Pursuing Alternative  
18 Humanitarian Relief**

19       The Rule's elimination of most uses of administrative closure will result in harsh  
20 consequences for the most vulnerable immigrants. Administrative closure has long been a crucial  
21 tool for the BIA and IJs to ensure just results for immigrants in removal proceedings who are eligible  
22 for forms of humanitarian relief over which USCIS has exclusive jurisdiction—including children  
23 who are pursuing Special Immigrant Juvenile Status (SIJS), crime victims pursuing U-visas, trafficking  
24 victims pursuing T-visas, and others. The BIA and IJs historically have used administrative closure  
25 to pause removal proceedings while immigrants pursue their applications with USCIS. *See Romero v.*  
26 *Barr*, 937 F.3d 282, 286-87 (4th Cir. 2019). These applications sometimes take considerable time for  
27 USCIS to decide, for reasons that are no fault of the immigrants who apply.

28       If the BIA and IJs cannot administratively close removal proceedings, many immigrants  
eligible for humanitarian relief will be effectively cut off from receiving such relief. The  
consequences could be devastating, as applications for humanitarian relief provide an important path  
to protection for many vulnerable immigrants from unsafe conditions in their native countries. For

1 example, in Los Angeles County, Catherine, a 15-year-old orphaned girl, pursued SIJS status because  
 2 she had been trafficked by her aunt in Guatemala and would face grave risk of harm if removed  
 3 there.<sup>4</sup> Catherine is building a safe life in Los Angeles where she can pursue her education and  
 4 contribute to the County's economy and community. The Los Angeles Justice Fund is helping  
 5 Catherine and nearly 100 applicants like her apply for humanitarian relief.

6 Without administrative closure, applicants like these could face removal before their  
 7 applications have been processed *even though they are eligible for humanitarian relief*, and even though  
 8 administrative closure for years provided an effective and efficient way for immigration courts to  
 9 allow time for these applications to be considered. The Rule's elimination of this critical procedural  
 10 mechanism will thrust many immigrants back into the life-threatening situations they struggled to  
 11 escape, for no reason other than a lack of inter-agency coordination.

12       **2. The Rule Limits the Ability of the BIA and IJs To Remand and Reopen  
 13 Cases, Even Where Relief Has Become Available or Where Immigrants  
 Could Be Removed in Error**

14 The Rule also sets forth one-sided restrictions on the ability of the BIA or IJs to remand or  
 15 reopen cases that will prevent immigrants from receiving relief if they become eligible because of a  
 16 change in law or fact. The BIA and IJs generally have used remand and reopening to allow a  
 17 deficient record to be further developed, to consider new facts that come to light, and to reevaluate  
 18 claims if there is a pertinent change in law. But the Rule precludes the BIA from using remand for  
 19 further fact-finding or issue development, except to allow the *government* to introduce facts *in support*  
 20 of removal. 85 Fed. Reg. at 81589-90. The Rule also would remove the BIA's and IJs' ability to  
 21 reopen or reconsider a decision *sua sponte* if a change in law or fact arises after the 90-day deadline  
 22 that immigrants have to move to reopen their case. *Id.* at 81591.

23 The Rule thus strips the BIA and IJs of the ability to respond to new circumstances that  
 24 could open a path to immigration relief. Restrictions on remand and reopening will hurt immigrants  
 25 like Cynthia, a mother of three U.S. citizen children who has lived in Los Angeles County for over 15  
 26

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27       <sup>4</sup> L.A. Cty. Dep't of Consumer & Business Affairs, *Two-Year Report – Legal Representation for Los Angeles*  
 28 *County Residents Facing Removal* 100 (Feb. 24, 2020) ("LAJF Report").

1 years, and who is seeking asylum on the basis of domestic violence with the help of the Los Angeles  
 2 Justice Fund.<sup>5</sup> The legal test for asylum claims premised on domestic violence has shifted  
 3 throughout the course of her proceedings and continues to change.<sup>6</sup> If there is a further change in  
 4 law that requires Cynthia to make a new showing to support her case when it is already on appeal, the  
 5 BIA would need the discretion to remand to allow her to demonstrate her eligibility for relief.  
 6 Otherwise, Cynthia could be removed from her children, despite a potentially meritorious claim for  
 7 relief.

8         Restrictions on remand and reopening also will prevent immigrants from presenting valid  
 9 claims for immigration relief in the first instance. Mr. A, an indigenous man who has lived in the  
 10 United States for 15 years with his wife and U.S. citizen child and who fears returning to his home  
 11 country because of his ethnicity, hired a man known to be a lawyer in his community after being  
 12 detained. In fact, the man had been disciplined for the unauthorized practice of law. The New York  
 13 Legal Assistance Group took on Mr. A's case, filed an appeal with the BIA, and argued that Mr. A  
 14 had been defrauded and prevented from filing an asylum application. The BIA remanded and Mr. A  
 15 was released pending a final hearing on his asylum claim. Had Mr. A's case been filed after the Rule,  
 16 however, he would not have been able to present his claim for asylum.

17         If the BIA and IJs cannot remand or reopen a case to allow new evidence or changed legal  
 18 circumstances, many immigrants will be removed for no reason other than poor luck and timing.  
 19 Instead of receiving the relief for which they are eligible, these immigrants will be uprooted from  
 20 their families and communities and returned to the precarious conditions from which they fled.

21             **3. The Rule Condenses the Timeline for Appeal, Preventing Effective  
 22 Representation and Favoring Hasty Dismissals**

23         The Rule compresses the timeline for appellate proceedings, which will burden advocates as  
 24 well as the BIA. The Rule imposes a simultaneous, rather than consecutive, briefing schedule for  
 25 immigration appeals and reduces the maximum allowable extension from 90 days to only 14 days. 85  
 26 Fed. Reg. at 81588. This simultaneous briefing schedule is a significant departure from almost every  
 27 other appellate adjudication system in the United States and will require immigrants' advocates to

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28         <sup>5</sup> *Id.* at 97.

<sup>6</sup> *Id.*

1 brief arguments without understanding how the government has framed the issue. In order to reply  
 2 to the government's arguments, advocates will have to rely on the 14-day extension, which in practice  
 3 likely will only allow 9-10 days for drafting the brief because of common delays in mail service. This  
 4 compressed timeline will make appeals highly resource-intensive and will limit immigrants' ability to  
 5 respond to arguments made by the government for their removal. Thus, immigrants will not have  
 6 the ability to present their claims fully before the BIA.

7       The Rule also shortens the BIA's time to evaluate appeals. The Rule requires the BIA to  
 8 evaluate appeals for summary dismissal within 14 days; issue decisions on summary dismissals within  
 9 30 days; and take no more than 90 days to issue a final decision on most other appeals. *Id.* at 81591-  
 10 92. This compressed timeframe will increase pressure to review cases quickly rather than accurately  
 11 and thus will result in higher rates of erroneous removals of immigrants whose appeals required more  
 12 searching review. Especially when combined with a simultaneous briefing schedule that deprives the  
 13 BIA of full briefing by the advocates of each others' arguments, the BIA will return higher rates of  
 14 removal, including in cases where the immigrant had a valid claim for relief. These higher rates will  
 15 not reflect the merits of the cases, but rather the Rule's arbitrary constraints.

16           **B. When Immigrants Are Unfairly Denied Procedural Safeguards And Unjustly  
 17 Removed, Local Communities, Like *Amici*, Suffer**

18       The Rule will lead to the removal of immigrants who have valid defenses and claims for relief  
 19 because its procedural changes prevent immigrants from presenting those valid defenses and claims  
 20 for relief. These avoidable removals will cause harmful ripple effects throughout local communities,  
 21 including *Amici*. *First*, children in mixed-status families will suffer detrimental effects from the  
 22 removal of an immigrant parent, which in turn will dampen their future potential and contribution to  
 23 their communities. *Second*, local economies will suffer as they lose the contribution of valuable  
 24 immigrant workers. *Third*, local governments that have invested in removal defense will serve fewer  
 25 immigrants because the Rule demands greater resources to serve each client.

26           **1. The Rule Will Lead to Increased Family Separation, Which Will Result  
 27 in Long-Term Harm to Children in Local Communities**

28       The Rule will lead to the removal of immigrants who have resided in the United States for  
 several years and built families here. Nationwide, over 50 million people live in mixed-status

1 families—in which some members are U.S. citizens or lawful permanent residents and some  
 2 members are undocumented immigrants—including over 13 million U.S. citizen children. In Los  
 3 Angeles County alone, roughly one third of all County residents live in a noncitizen or mixed-status  
 4 family.<sup>7</sup> Nearly 60 percent of County children—over 1.2 million children total—have at least one  
 5 immigrant parent, and 44 percent of County households are headed by an immigrant.<sup>8</sup> In San  
 6 Francisco, approximately 54 percent of children have at least one immigrant parent, and 34 percent  
 7 of households are headed by an immigrant.<sup>9</sup> Nearly 60 percent of New Yorkers share households  
 8 with at least one immigrant, including about one million in mixed-status households.<sup>10</sup> These  
 9 families, particularly children, depend on their immigrant members for their continued well-being.

10 Children will suffer traumatic and lifelong consequences when immigrant parents are unjustly  
 11 removed from their families as a result of the Rule’s procedural restrictions. Children in mixed-status  
 12 families already accumulate a psychological toll living under the ever-present threat that a parent  
 13 could be removed.<sup>11</sup> If parents are removed from their families, the children are even more likely to  
 14 experience toxic stress, which negatively impacts brain development and leads to the development of  
 15 mental health conditions such as depression and post-traumatic stress disorder, as well as physical  
 16 conditions such as cancer, stroke, diabetes, and heart disease in adulthood.<sup>12</sup> Poorer health and  
 17  
 18

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19 <sup>7</sup> See *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, MANATT (Oct. 11, 2018,  
 20 <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

21 <sup>8</sup> *Los Angeles*, Ctr. for the Study of Immigrant Integration, USC Dornsife College of Letters, Arts &  
 22 Sciences, [https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES\\_web.pdf](https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES_web.pdf) (last visited Jan.  
 25, 2021).

23 <sup>9</sup> *San Francisco*, Ctr. for the Study of Immigrant Integration, USC Dornsife College of Letters, Arts &  
 24 Sciences, [https://dornsife.usc.edu/assets/sites/731/docs/SANFRANCISCO\\_web.pdf](https://dornsife.usc.edu/assets/sites/731/docs/SANFRANCISCO_web.pdf) (last visited Jan. 28, 2021).

25 <sup>10</sup> New York City Office of Civil Justice, *Annual Report 13* (2019) (“NYC OCJ Report”).

26 <sup>11</sup> Luis H. Zayas & Laurie Cook Hefron, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, Am. Psychological Ass’n (2016),  
<https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation>.

27 <sup>12</sup> Am. Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 22, 2019),  
<https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

1 educational outcomes for these children in turn will lead to reduced potential for future success.<sup>13</sup>  
 2 This will harm not only these children, but also the local communities like *Amici* that benefit from  
 3 their success. When children achieve greater educational outcomes, particularly college graduation,  
 4 this translates to wage increases for everyone in the work force, faster GDP growth, and greater  
 5 investment in local goods and services.<sup>14</sup> The Rule harms these interests, however, by increasing  
 6 unjust removals of parents from their children.

7 **2. The Rule Will Harm *Amici*'s Economies and Communities as More  
 Immigrants Face Unjust Removal**

8 *Amici* also will lose the economic and social contributions of the immigrants who are unjustly  
 9 removed. Nationwide, 23 million immigrant workers contribute over \$3 trillion in GDP and nearly  
 10 \$6 trillion in total economic output.<sup>15</sup> In Los Angeles County, immigrant workers constitute one  
 11 third of the total labor force; contribute \$251 billion to the gross state product, \$452 billion in  
 12 economic output, and \$75.8 billion in taxes; and support 2.8 million jobs.<sup>16</sup> In the San Francisco  
 13 area, immigrants comprise 37 percent of the labor force,<sup>17</sup> and approximately 41 percent of Bay Area  
 14 business owners in 2018 were immigrants.<sup>18</sup> In New York City, immigrants account for 43 percent  
 15 of the city's work force and nearly one third of the total gross product, and they contribute over \$1  
 16 billion in state and local taxes.<sup>19</sup>

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17 <sup>13</sup> Sophia Koropeckyj, et al., Am. Acad. of Arts & Sciences, The Economic Impact of Increasing  
 18 College Completion 21 (2017),  
[https://www.amacad.org/sites/default/files/publication/downloads/CFUE\\_Economic-Impact.pdf](https://www.amacad.org/sites/default/files/publication/downloads/CFUE_Economic-Impact.pdf)  
 19 (demonstrating a correlation between higher rates of college graduation and GDP growth).

20 <sup>14</sup> *Id.*; Enrico Moretti, U.C. Berkeley Dep't of Econ., Social Returns to Education and Human  
 Capital Externalities: Evidence from Cities 1 (1998),  
[http://darp.lse.ac.uk/PapersDB/Moretti\\_\(98\).pdf](http://darp.lse.ac.uk/PapersDB/Moretti_(98).pdf); Jonathan Rothwell, The Brookings Institute,  
 21 What Colleges Do for Local Economies: A Direct Measure Based on Consumption (2015),  
<https://www.brookings.edu/research/what-colleges-do-for-local-economies-a-direct-measure-based-on-consumption/>.

22 <sup>15</sup> Hinojosa-Ojeda, *supra* note 1, at 20.

23 <sup>16</sup> *Id.* at 20, 22-23.

24 <sup>17</sup> Jamila Henderson, et al. *A Profile of Frontline Workers in the Bay Area*, Bay Area Equity Atlas,  
<https://bayareaequityatlas.org/essential-workers> (last visited Jan. 28, 2021).

25 <sup>18</sup> *Immigrants in California*, Am. Immigration Council,  
[https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_california.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf) (last visited Jan. 28, 2021).

26 <sup>19</sup> Jennifer Stave, et al., *Evaluation of the New York Immigrant Family Unity Project* 55, Vera Inst. of Justice  
 (Nov. 2017), [new-york-immigrant-family-unity-project-evaluation.pdf](https://new-york-immigrant-family-unity-project-evaluation.pdf) ("NYIFUP Report"); Office of

1           Undocumented immigrants, in particular, are making significant contributions to local  
 2 economies and communities, despite great hardship. Undocumented workers generate \$500 billion  
 3 in labor income and contribute over \$1 trillion to the GDP, even though they are disproportionately  
 4 concentrated in the lowest-paying jobs.<sup>20</sup> Throughout the COVID-19 pandemic, nearly 80 percent  
 5 of undocumented immigrants have worked in essential sectors.<sup>21</sup> Refugees—who have fled violence  
 6 in their home countries—soon build roots in their new communities and contribute \$22 billion in net  
 7 fiscal benefits to state and local governments.<sup>22</sup> Indeed, research has shown that refugees and  
 8 migrants provide substantial benefits to their host countries: a 2018 student that analyzed 30 years of  
 9 data from Western Europe concluded that after spikes in immigration, host countries' economies  
 10 improved and unemployment rates dropped.<sup>23</sup>

11           If vital members of local communities are removed when they otherwise could have been  
 12 eligible for relief, their loss will be felt throughout *Amici's* communities. Los Angeles County will  
 13 lose residents like Daniel, an immigrant who was paralyzed from the waist down in a violent shooting  
 14 and who now volunteers at rehabilitation centers and teaches students in medical schools about living  
 15 with a disability. With the help of the Los Angeles Justice Fund, Daniel was able to have his removal  
 16 order terminated, but only after his case was reopened when an IJ read the outpouring of letters of  
 17 support from the community commanding Daniel's character, volunteerism, and civic spirit.<sup>24</sup> Had  
 18 the Rule been in place, the IJ would not have been able to consider Daniel's significant civic  
 19 contributions and reopen his case *sua sponte*, and the County would have lost his contributions.

20  
 21 the New York State Comptroller, *The Role of Immigrants in the New York City Economy* (Nov. 2015),  
 22 <https://www.osc.state.ny.us/sites/default/files/reports/documents/pdf/2018-11/report-7-2016.pdf>.

23           <sup>20</sup> Hinojosa-Ojeda, *supra* note 1, at 15, 21.

24           <sup>21</sup> *Id.* at 10.

25           <sup>22</sup> See National Immigration Forum, *Immigrants as Economic Contributors: Refugees Are a Fiscal Success Story for America* (June 14, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-refugees-are-a-fiscal-success-story-for-america/>.

26           <sup>23</sup> Amy Maxmen, *Migrants and Refugees Are Good For Economies*, Nature (June 20, 2018)  
 27 <https://www.nature.com/articles/d41586-018-05507-0> (summarizing the results of a study by the  
 Paris School of Economics).

28           <sup>24</sup> LAJF Report, *supra* note 4, at 97.

1                   **3. The Rule Undermines *Amici's* Investments in Removal Defense**

2                   The Rule will undercut *Amici's* significant investments to support direct legal services to  
 3 immigrants who cannot afford representation. Because *Amici* recognize the vital importance of  
 4 immigrant residents to their families and local communities, several have made significant  
 5 investments in pro bono legal services for immigrants. Los Angeles County and the City of Los  
 6 Angeles, for example, have jointly invested \$5 million dollars in the Los Angeles Justice Fund.<sup>25</sup> New  
 7 York City has invested nearly \$60 million annually through multiple legal services programs,  
 8 including the New York Immigrant Family Unity Project, the first publicly funded legal services  
 9 program specifically for detained immigrants.<sup>26</sup> San Francisco has invested over \$11.1 million in  
 10 immigration legal defense<sup>27</sup> to help sustain programs like the San Francisco Public Defender's  
 11 Immigration Unit and the San Francisco Legal Defense Collaborative.<sup>28</sup>

12                  *Amici's* investments help their communities, including by serving long-time residents,  
 13 children, families with U.S. citizen children, and immigrants who are particularly vulnerable. New  
 14 York City's Family Immigrant Unity Project has represented over 1,500 immigrants who had lived in  
 15 the United States for over 15 years on average and who are parents to nearly 2,000 children in the  
 16 United States.<sup>29</sup> New York City's Immigrant Child Advocates' Relief Effort represents over 2,500  
 17 immigrant youth in removal proceedings annually.<sup>30</sup> The Los Angeles Justice fund has served over  
 18 500 clients, who on average had lived in the County for over a decade and over 80 percent of whom

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19                  <sup>25</sup> *Id.* at 8.

20                  <sup>26</sup> NYC OCJ Report, *supra* note 10, at 37. Other programs include the Immigrant Opportunity  
 21 Initiative, which provided legal assistance in over 15,000 complex cases in 2019, including removal  
 22 defense, *id.* at 13, 36; the Immigrant Child Advocates' Relief Effort, which serves unaccompanied  
 23 minor children, *id.* at 37-38; and the Rapid Response Legal Collaborative, which provides emergency  
 24 assistance to those at imminent risk of deportation who may not have the right to see an IJ or  
 25 otherwise are facing a fast-track to removal, *id.* at 14.

26                  <sup>27</sup> Press Release, San Francisco Office of the Mayor, Mayor Mark Farrell, Assemblymember Phil Ting  
 27 and Supervisor Sandra Lee Fewer Announce Funding Efforts to Provide Universal Representation  
 28 for Detained Northern California Immigrants (Mar. 1, 2018).

29                  <sup>28</sup> *Immigration Unit*, San Francisco Public Defender,  
 30 https://sfpublicdefender.org/services/immigration-unit/ (last visited Jan. 28, 2021); *Why We're Here*,  
 S.F. Immigrant Legal Defense, https://sfildc.org (last visited Jan. 28, 2021).

31                  <sup>29</sup> NYIFUP Report, *supra* note 19, at 5, 10, 20.

32                  <sup>30</sup> NYC OCJ Report, *supra* note 10, at 36-37.

1 were eligible for fear-based protections or asylum.<sup>31</sup> Twenty-four percent of the immigrants served  
 2 were children at the time Los Angeles Justice Fund attorneys first began to represent them.<sup>32</sup>

3 These local initiatives have been extremely successful: Forty-eight percent of immigrants  
 4 represented by the Los Angeles Justice Fund or New York Immigrant Family Unity Project have  
 5 achieved positive outcomes in their cases, compared with only four to five percent of immigrants  
 6 without legal representation—up to an 1100 percent increase in success.<sup>33</sup> And what that success  
 7 means is that immigrants who successfully assert a valid claim for immigration benefits or a valid  
 8 claim of relief from removal are able to remain with their families and contribute to *Amici's*  
 9 communities. Indeed, New York City's provision of legal representation to immigrants in removal  
 10 proceedings has led to hundreds of workers gaining or maintaining work authorization, translating  
 11 into nearly \$1 million in additional state and local tax revenue.<sup>34</sup>

12 But *Amici's* local initiatives do not come close to meeting demand. The Los Angeles Justice  
 13 Fund could provide representation to less than a third of the immigrants who were screened in  
 14 consultations.<sup>35</sup> An average case can demand between 15 and 20 attorney hours per month.<sup>36</sup>

15 The Rule will drastically increase the hours and expense of each removal defense by adding  
 16 new procedural hurdles. By eliminating administrative closure, the Rule will remove a key tool for  
 17 managing dockets and force advocates to devote additional hours to manage proceedings before  
 18 USCIS and EOIR simultaneously. The Rule's condensed timeline for appeals will prevent attorneys  
 19 from managing multiple cases effectively because with simultaneous briefing and only a 14-day  
 20 extension, advocates will need to concentrate more attention per case in the short-term. The Rule's  
 21 restrictions on remand and reopening also will mean that advocates must devote more time and  
 22 resources to each case to try to ensure, as best possible, that issues are preserved for appeal. Under  
 23

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25<sup>31</sup> LAJF Report, *supra* note 4, at 4, 8.

26<sup>32</sup> *Id.* at 4.

27<sup>33</sup> *Id.*; NYIFUP Report, *supra* note 19, at 9.

28<sup>34</sup> NYIFUP Report, *supra* note 19, at 58.

<sup>35</sup> LAJF Report, *supra* note 4, at 4.

<sup>36</sup> *Id.* at 30.

1 these additional pressures, the legal services organizations in which *Amici* have invested will be forced  
 2 to reduce the number of clients they serve in order to provide effective representation.

3 **II. THE RULE SHOULD BE ENJOINED BECAUSE IT VIOLATES THE APA AND  
 4 THE CONSTITUTION'S DUE PROCESS CLAUSE**

5 **A. The Rule is Arbitrary And Capricious Because EOIR Failed To Consider The  
 Unique Harms The Rule Would Cause Local Governments**

6 The Rule is arbitrary and capricious because it was promulgated without consideration of the  
 7 severe ramifications on families, the future prosperity of local communities, and local governments'  
 8 investments in removal defense that *Amici* set forth above. *First*, the Rule failed to consider the  
 9 important reliance interests of immigrants' families and children, whose livelihoods and prospects for  
 10 long-term success depend on family unity. *Second*, the Rule did not consider the reliance interests of  
 11 local communities, like *Amici*, whose economies rely on the contributions of immigrant residents and  
 12 whose government systems depend on the trust of immigrant communities. *Third*, the Rule did not  
 13 consider the reliance interests of locally funded immigrant legal services organizations, who have  
 14 limited resources and whose core missions will be undercut by the Rule.

15 When an agency fails to consider important impacts of a rule or serious reliance interests that  
 16 are harmed by a change in policy, it is arbitrary and capricious in violation of the APA. "Federal  
 17 administrative agencies are required to engage in 'reasoned decisionmaking.'" *See Michigan v. E.P.A.*,  
 18 576 U.S. 743, 750 (2015). An agency action is arbitrary and capricious where the agency has "entirely  
 19 failed to consider an important aspect" of the issue before it. *See Motor Vehicle Mfrs. Ass'n of U.S. Inc.  
 20 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Particularly where an agency changes  
 21 established rules and procedures in the immigration context, it must consider a variety of reliance  
 22 interests, not only the interests of the directly impacted immigrants, but also the consequences for  
 23 their families and the local governments that rely on their contribution. *See Immigrant Legal Res. Ctr. v.  
 24 Wolff*, 2020 WL 5798269, at \*15-16 (N.D. Cal. Sept. 29, 2020) (rejecting Department of Homeland  
 25 Security's argument that an agency need only consider the reliance interests of those "directly  
 26 affected" by a proposed action, and finding that the interests of legal services organization plaintiffs  
 27 who served asylum applicants affected by a rule change must be considered); *see also Pangea Legal Servs.  
 28 v. U.S. Dep't of Homeland Sec.*, 2020 WL 6802474, at \*16 (N.D. Cal. Nov. 19, 2020).

Indeed, just months before Defendants promulgated the Rule, the Supreme Court ruled that an agency **must** consider the consequences of a rule not only on those directly affected, but also on others in their families and communities, along with local governments like *Amici*. In June 2020 in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), the Court ruled that rescission of the DACA program—another Trump Administration attack on immigrants—was arbitrary and capricious in part because DHS did not consider the consequences that “would radiate outward to DACA recipients’ families, including their 200,000 U.S.-citizen children . . . [and] States and local governments [that] could lose \$1.25 billion in tax revenue each year.” 140 S. Ct. at 1914 (internal quotation marks omitted).

Here too, EOIR entirely ignored the potential harm to local communities when it finalized the Rule—even after these concerns were put before EOIR in public comments. Los Angeles County, for example, detailed at length how local governments would be harmed by the unjust removal of valuable members of their communities and how the County’s significant investment in immigrant legal services would be undercut. New York City and the City of Minneapolis similarly explained how the Rule would harm their local economies, undermine their investments in removal defense, and damage immigrant communities’ trust in the legal system and other public systems. Yet, the finalized Rule did not acknowledge any of these potential harms.

Rather, EOIR’s response to public comments simply stated, without explanation, that the Rule’s procedural changes complied with statutory and constitutional rights, and EOIR failed to implement any substantive changes to address local governments’ concerns. See 85 Fed. Reg. at 81592-81649. EOIR did not engage with local governments’ concern that families and children will suffer when immigrants are unjustly removed. EOIR also failed to address the concern that local communities will be harmed by the removal of immigrants who contribute to their economies and civic and cultural life. And EOIR did not even acknowledge, much less consider, the harm to legal services organizations. Because EOIR failed to engage with the consequences for immigrants, their families, their communities, and local governments like *Amici* that “would radiate outward” from the Rule’s procedural changes, the Rule is arbitrary and capricious. *Regents*, 140 S. Ct. at 1914.

1                   **B.         The Rule Also Violates Immigrants' Due Process Rights**

2                  The Rule also is unlawful because it will deny immigrants the full and fair proceedings they  
 3 are guaranteed by the Due Process Clause. The Constitution's Due Process Clause protects  
 4 immigrants in removal proceedings and guarantees them the right to fair proceedings. *See Zadvydas v.*  
 5 *Davis*, 533 U.S. 678, 693-94 (2001). To evaluate the constitutional sufficiency of proceedings, courts  
 6 weigh three factors: (1) the significance of the interest at stake to the individual who is subject to the  
 7 proceedings; (2) the risk that the individual will be erroneously deprived that interest as a result of the  
 8 procedures; and (3) the government's interest in using the challenged procedures instead of additional  
 9 or different procedures. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Mathews v. Eldridge*, 424 U.S.  
 10 319, 335 (1976). A rule that violates the Due Process Clause should be enjoined on that basis and  
 11 also because it is "contrary to constitutional right" in violation of the APA. 5 U.S.C. § 706(2)(B).

12                 As to the first factor, the Rule undoubtedly implicates "the loss of a significant liberty  
 13 interest" because "deportation 'visits a great hardship on the individual and deprives him of the right  
 14 to stay and live and work in this land of freedom.'" *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1161  
 15 (9th Cir. 2004), citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). For particularly vulnerable  
 16 immigrants seeking fear-based protections or humanitarian relief, the interest at stake "could hardly  
 17 be greater." *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013).

18                 As to the second factor, the Rule's severe restrictions on appellate procedures will  
 19 significantly increase the risk of erroneous removal of immigrants otherwise eligible for relief.  
 20 Without administrative closure, many immigrants in removal proceedings will be unjustly deported  
 21 despite their applications for humanitarian and other immigration relief from USCIS. *See supra* I.A.1;  
 22 *Romero*, 937 F.3d at 286-87 (noting that administrative closure primarily has been used to allow  
 23 immigrants in removal proceedings to seek relief from USCIS for which they may be eligible). And  
 24 without procedural protections like discretion to remand or reopen cases, many immigrants who  
 25 would have been able to demonstrate eligibility for relief will not be able to present their case. *See*  
 26 *supra* I.A.2. Indeed, the Rule makes illusory the very benefits and grounds for relief that are written  
 27 into the immigration law: it blocks the efficacy of benefits like SIJS, U-visas, T-visas, and VAWA  
 28 visas because under the Rule, even immigrants who qualify for these visas will not be able to benefit

1 from them because the Rule's changes will block immigrants from pursuing these grounds for  
 2 relief.<sup>37</sup>

3 Third, the government's so-called efficiency interest does not justify the need for the Rule's  
 4 restricted procedures, rather than past procedures or alternatives that are more protective of  
 5 immigrants' significant liberty interests. Although EOIR claims that the Rule serves its interests in  
 6 "ensur[ing] the consistency, efficiency, and quality of [immigration] adjudications," 85 Fed. Reg. at  
 7 81588, the Rule will serve none of these interests. The Rule will undermine rather than further the  
 8 quality of immigration adjudication because it will lead to the unnecessary removal of immigrants  
 9 who otherwise would be eligible for immigration relief. *Cf. J.G. v. Warden, Irwin Cty. Detention Ctr.*,  
 10 2020 WL 6938013, at \*7 (M.D. Ga. Nov. 16, 2020) (noting that the government's interest should be  
 11 avoiding, rather than increasing, unnecessary detention of immigrants in removal proceedings  
 12 because this wastes taxpayers' money and harms judicial efficiency). The Rule will not yield  
 13 consistency because changes in substantive immigration law will apply only to cases that are  
 14 proceeding before an IJ, as the BIA will have limited ability to remand for reconsideration. 85 Fed.  
 15 Reg. at 81591. Finally, the elimination of administrative closure will undercut efficiency by removing  
 16 a crucial tool for the BIA and IJs to manage their dockets; indeed, since EOIR has attempted to  
 17 restrict administrative closure, the backlog of immigration cases has only continued to skyrocket.<sup>38</sup>  
 18 EOIR simply fails to demonstrate that the Rule will promote its interests better than past procedures.  
 19 To the extent the Rule promotes some efficiency, "mere 'administrative burden' alone cannot  
 20 ordinarily serve as a rationale for outweighing serious due process rights to fair adjudications."  
 21 *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 724 n.8 (1st Cir. 1999); *see also Fuentes v.*  
 22 *Sherin*, 407 U.S. 67, 90 n.22 (1972) ("Procedural due process is not intended to promote efficiency.").  
 23 In short, EOIR cannot justify the Rule's disregard for immigrants' due process rights.

## 24 CONCLUSION

25 *Amici* respectfully request that this Court grant Plaintiffs' motion and enjoin the Rule.

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26 <sup>37</sup> See Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 Yale L.J.  
 27 F. 567, 579-81 (2020) (describing how administrative closure protects the rights of immigrants  
 28 applying for humanitarian relief including U-visa applications).

<sup>38</sup> See *id.* at 567, 579.

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3 Dated: January 29, 2021

Respectfully submitted,

4  
5 MARGARET L. CARTER  
DANIEL R. SUVOR  
O'MELVENY & MYERS LLP  
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10 By: /s/ Margaret L. Carter  
11 Margaret L. Carter  
12 Attorneys for *Amicus Curiae*  
13 County of Los Angeles  
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## LIST OF AMICI CURIAE

<i>City of Albuquerque, New Mexico</i>	<i>County of Milwaukee, Wisconsin</i>
<i>City of Austin, Texas</i>	<i>City of Minneapolis, Minnesota</i>
<i>City of Boulder, Colorado</i>	<i>City of New York, New York</i>
<i>City of Cambridge, Massachusetts</i>	<i>City of Oakland, California</i>
<i>Cook County, Illinois</i>	<i>City of Philadelphia, Pennsylvania</i>
<i>City of Dallas, Texas</i>	<i>City of Portland, Oregon</i>
<i>City of Gary, Indiana</i>	<i>City of Providence, Rhode Island</i>
<i>City of Gaithersburg, Maryland</i>	<i>City of Sacramento, California</i>
<i>City of Holyoke, Massachusetts</i>	<i>City of Saint Paul, Minnesota</i>
<i>City of Houston, Texas</i>	<i>City of San Diego, California</i>
<i>King County, Washington</i>	<i>City and County of San Francisco, California</i>
<i>City of Los Angeles, California</i>	<i>City of Seattle, Washington</i>
<i>County of Los Angeles, California</i>	<i>City of Somerville, Massachusetts</i>
<i>City of Malden, Massachusetts</i>	<i>City of West Hollywood, California</i>

**ADDITIONAL COUNSEL FOR AMICI CURIAE**

ESTEBAN A. AGUILAR, JR.  
City Attorney, City of Albuquerque  
P.O. Box 2248  
Albuquerque, New Mexico 87103

*Attorney for the City of Albuquerque, New Mexico*

ANNE L. MORGAN  
City Attorney, City of Austin  
PO Box 1546  
Austin, Texas 78767-1546

*Attorney for the City of Austin, Texas*

THOMAS A. CARR, ESQ.  
City Attorney  
1777 Broadway  
Boulder, Colorado 80302

*Attorney for the City of Boulder, Colorado*

NANCY E. GLOWA  
City Solicitor, City of Cambridge  
795 Massachusetts Avenue  
Cambridge Massachusetts 02130

*Attorney for the City of Cambridge, Massachusetts*

JESSICA M. SCHELLER  
Chief, Advice, Business & Complex Litigation  
Division  
Cook County State's Attorney's Office  
500 Richard J. Daley Center  
Chicago, Illinois 60602

*Attorney for Cook County, Illinois*

CHRISTOPHER J. CASO  
Dallas City Attorney  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

*Attorney for the City of Dallas, Texas*

RODNEY POL, JR.  
City Attorney  
401 Broadway  
Gary, Indiana 46402

*Attorney for the City of Gary, Indiana*

N. LYNN BOARD  
City Attorney  
City of Gaithersburg, Maryland  
31 South Summit Avenue  
Gaithersburg, Maryland 20877

*Attorney for City of Gaithersburg, Maryland*

TASHA MARSHALL  
Assistant City Solicitor  
City of Holyoke Law Department  
20 Korean Veterans Plaza, Room 204  
Holyoke, Massachusetts 01040

*Attorney for the City of Holyoke, Massachusetts*

ARTURO G. MICHEL  
City Attorney  
City of Houston Legal Department  
900 Bagby Street, 4th Floor  
Houston, Texas 77002

*Attorneys for the City of Houston, Texas*

HOWARD PHILLIP SCHNEIDERMAN  
Senior Deputy Prosecuting Attorney  
King County Prosecuting Attorney's Office  
516 - 3rd Avenue, W400  
Seattle, Washington 98104-2388

*Attorney for King County, Washington*

MICHAEL N. FEUER  
City Attorney  
200 North Main Street  
Los Angeles, California 90012

*Attorney for the City of Los Angeles, California*

KATHRYN M. FALLON  
City Solicitor  
Malden Legal Department  
215 Pleasant Street, Suit 420  
Malden, Massachusetts 02148

*Attorney for the City of Malden, Massachusetts*

MARGARET C. DAUN  
Corporation Counsel  
901 North 9th Street, Suite 303  
Milwaukee, Wisconsin 53233

*Attorney for the County of Milwaukee, Wisconsin*

1 JAMES R. ROWADER, JR.  
2 City Attorney, City of Minneapolis  
3       City Hall, Room 210  
3       350 South Fifth Street  
3       Minneapolis, Minnesota 55415

4 *Attorney for the City of Minneapolis, Minnesota*

5 JAMES E. JOHNSON  
6 Corporation Counsel, City of New York  
7       100 Church Street  
7       New York, New York 10007

8 *Attorney for the City of New York, New York*

9 BARBARA J. PARKER  
10      City Attorney  
10      One Frank H. Ogawa Plaza, 6th Floor  
10      Oakland, California 94612

11 *Attorney for the City of Oakland, California*

12 DIANA P. CORTES  
13      Acting City Solicitor, City of Philadelphia  
13      1515 Arch Street, 17th Floor  
13      Philadelphia, Pennsylvania 19102

14 *Attorney for the City of Philadelphia, Pennsylvania*

15 ROBERT TAYLOR  
16      Interim City Attorney, City of Portland  
16      1221 SW 4th Avenue, Suite 430  
16      Portland, Oregon 97204

17 *Attorney for the City of Portland, Oregon*

18 JEFFREY DANA  
19      City Solicitor  
20      444 Westminster Street, Suite 220  
20      Providence, Rhode Island 02903

21 *Attorney for the City of Providence, Rhode Island*

22 SUSANA ALCALA WOOD  
23      City Attorney, City of Sacramento  
23      915 I Street, Fourth Floor  
23      Sacramento, California 95814

24 *Attorney for the City of Sacramento, California*

LYNDSEY M. OLSON  
City Attorney, City of Saint Paul  
400 City Hall and Court House  
15 West Kellogg Boulevard  
Saint Paul, Minnesota 55102

*Attorney for the City of Saint Paul, Minnesota*

MARK ANKCORN  
Chief Deputy City Attorney  
1200 Third Avenue, Suite 1620  
San Diego, California 92101

*Attorney for the City of San Diego, California*

DENNIS J. HERRERA  
City Attorney  
City Hall Room 234  
One Dr. Carlton B. Goodlett Place  
San Francisco, California 94102

*Attorney for the City and County of San Francisco,  
California*

PETER S. HOLMES  
Seattle City Attorney  
701 Fifth Avenue, Suite 2050  
Seattle, Washington 98104-7097

*Attorney for the City of Seattle, Washington*

FRANCIS X. WRIGHT, JR.  
City Solicitor, City of Somerville  
93 Highland Avenue  
Somerville, Massachusetts 02143

*Attorney for City of Somerville, Massachusetts*

MICHAEL JENKINS  
City Attorney, City of West Hollywood  
Best Best & Krieger, LLP  
1230 Rosecrans Avenue, Suite 110  
Manhattan Beach, California 90266

*Attorneys for the City of West Hollywood*